U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC 09 007 51516 Office: CALIFORNIA SERVICE CENTER Date: SEP 21 2010

IN RE: Petitioner: [redacted]

PETITION: Immigrant Petition by Alien Entrepreneur Pursuant to Section 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(5)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Marin Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition, which is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4. The director's ultimate conclusion that the petition is not approvable will be affirmed.

The petitioner seeks classification as an alien entrepreneur pursuant to section 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(5). The petitioner claims eligibility based on an investment in a regional center pursuant to section 610 of the Judiciary Appropriations Act, 1993, Pub. L. 102-395 (1993) as amended by section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000). The regional center, the Capital Area Regional Center Job Fund (CARc), was designated as a regional center by U.S. Citizenship and Immigration Services (USCIS) on November 25, 2005. On May 20, 2008, USCIS issued an e-mail acknowledging that CARc had obtained a new escrow agent and had a new address. Subsequently, aliens began filing Form I-526 petitions based on an investment in CARc. These petitions were supported by substantially amended agreements from those submitted with the original regional center proposal in 2005. The Form I-526s petitions did not disclose that these agreements had been amended from the 2005 agreements. In response to concerns raised by the Director, Texas Service Center (TSC), confirmed by the AAO on certification, CARc sought an amendment of the proposal in March 2009, which was approved. The CSC director approved a June 2009 amendment request on December 23, 2009.

The director determined that the petitioner had failed to demonstrate that the original business plan and projections continued to be viable. The director also determined that the petitioner had not established the lawful source of his funds. The director certified the notice of denial to the AAO pursuant to 8 C.F.R. § 103.4. In compliance with the regulation at 8 C.F.R. § 103.4(a)(2), the director provided notice to the petitioner, through counsel, and advised that a brief could be submitted directly to the AAO within 30 days.

In response, counsel, through the submission of a brief by [redacted] asserts that the regional center is seeking a second approved amendment to the regional center proposal that will include the regional center's current business plan. The director approved the amendment request on December 23, 2009. Significantly, the director advised: "This project approval in conjunction with the most recent approved general proposal amendment will allow current investors in this project to proceed with refiling their respective Forms I-526, Immigration Petitions by Alien Entrepreneurs with the appropriate fee." Counsel submits [redacted] brief and several exhibits, most of which relate to agreements that postdate the filing of the petition. Counsel further asserts that the director erred in concluding that the petitioner had not established the lawful source of his funds.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On certification, [redacted] acknowledges the AAO's *de novo* review, but states that "there is no reason to create new issues here, and if that were to happen the investors should receive prior notice of issues to address [the] AAO, since the certification decisions did not project a need to address such issues." While USCIS is required to give notice of derogatory information unbeknownst to the petitioner, 8 C.F.R. § 103.2(b)(16)(i), there is no requirement for USCIS to issue either a Notice of Intent to Deny prior to issuance of a decision at the Service Center or for the AAO to do so while a case is on certification.

Our major concern with the favorable findings by the director is that they are in contravention of binding regulations and longstanding precedent and federal court decisions holding that a petition must be approvable when filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008). Specifically in the context of a Form I-526 petition, the AAO stated in a precedent decision that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

[redacted] references an AAO decision on a previous Form I-526 petition involving a CARc investor. In that decision, we held that amendments to agreements or business plans that postdate the filing of the petition would not be considered. Thus, [redacted] is aware that this office has consistently conformed to the requirement that a petition must be approvable when filed and that material changes that postdate the filing of the petition will not be considered. The regional center's decision to continue to pursue these petitions while simultaneously seeking on amendments upon amendments, sometimes submitted to USCIS outside the adjudicative process through *ex parte* communications, does not diminish the binding nature of the regulation and precedent and federal court decisions cited above. Thus, we continue to hold that the petitioner must establish his eligibility as of the date of filing and withdraw any inference in the director's decision to the contrary. We also uphold the director's concerns regarding the viability of the original business plan presented. Finally, while CARc has now obtained a license to export services to Iranian investors, that license does not appear to cover transfers of funds directly or indirectly from prohibited banks in Iran and does not cover any transactions before the license was issued. Finally, beyond the decision of the director, the petitioner has not traced the source of his funds through the entire path described by counsel.

Section 203(b)(5)(A) of the Act, as amended by the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002), provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
>
> (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

As will be discussed in more detail below, an investment must consist of capital placed at risk for the purpose of generating a return, 8 C.F.R. § 204.6(j)(2), and must be made available to the business most closely responsible for crating the employment upon which the petition is based. *Matter of Izummi,* 22 I&N Dec. at 179.

The record indicates that the petition is based on an investment in a business, [redacted], (the Fund) which proposes to invest in a project located in CARc, a designated regional center pursuant to section 610 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993 as amended by section 402 of the Visa Waiver Permanent Program Act, 2000. The regulation at 8 C.F.R. § 204.6(m)(1) provides, in pertinent part: "Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section." The regulation at 8 C.F.R. § 204.6(m)(7) allows an alien to demonstrate job creation indirectly. The petitioner asserts that the new commercial enterprise will invest in the renovation of the Watergate Hotel. The director did not contest that the investment will be in a targeted employment area (TEA). Thus, the required investment amount in this matter is $500,000.[1]

PROCEDURAL HISTORY

The petitioner filed the instant petition on October 9, 2008. Thus, as stated above, the petitioner must establish his eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. The petitioner is a member of the Fund and proposes to invest in CARc, which proposes to

[1] The proposed investment will be wholly and entirely within Ward 2, a ward that is not itself suffering high unemployment in relation to the national unemployment rate. The director's conclusion that the investment will be within a targeted employment area is based on a designation by [redacted] for Planning and Economic Development, Washington, D.C. pursuant to 8 C.F.R. § 204.6(j)(6)(ii)(B). [redacted] designation includes Ward 2, but, of necessity, includes other wards and census tracts within D.C. to reach the necessary average unemployment rate. The director's conclusion that we must accept the designation is a reasonable interpretation of 8 C.F.R. § 204.6(j)(6)(ii)(B). That said, it is clear that the petitioner's investment of only $500,000 wholly within a ward that is not itself suffering high unemployment completely undermines the congressional intent underlying section 203(b)(5)(C)(ii) of the Act. Specifically, Congress intended that the reduced investment amount would encourage investment in areas that are truly suffering high unemployment. While we are bound by 8 C.F.R. § 204.6(j)(6)(ii)(B), it would appear that this regulation has produced unintended consequences that are clearly contrary to congressional intent.

invest the Fund's money in the development of the former Watergate Hotel in a joint venture with Monument Realty. As will be discussed below, the original business plan presupposed Monument Realty's ownership of the property to be developed and discussed a collaboration with Lehman Brothers.

In support of the petition, the petitioner indicated that he was submitting an operating agreement and private placement memorandum, but those exhibits were not included. The petitioner did submit a subscription agreement indicating that the application fee had been waived and that the expense fee had been deferred. The petitioner also submitted a July 30, 2007 letter from [redacted] of the Washington, D.C. Office of the Chief Financial Officer, confirming CARc's methodology in combining Ward 2 with other areas to reach an unemployment rate sufficient to qualify the Ward 2 as a targeted employment area (TEA), defined at 8 C.F.R. § 204.6(e).

Finally, the petitioner submitted evidence relating to the source of his investment. Specifically, he submitted evidence of his ownership of 100,000 $.01 par value shares in a U.S. company [redacted], [redacted]. August 7, 2008 board meeting minutes state that the petitioner would capitalize the company "for the sole purpose of investment in the United States" and that the $500,000 capital would be transferred into counsel's trust account for the purpose of acquiring membership interests in the Fund. A financial status certificate from Eghtesad Novin Bank in Tehran confirms a total balance of 6,080,000,000 Rials ($669,308) in the petitioner's various accounts as of July 17, 2008. Another certificate from the same bank confirms a balance of 624,883,694 Rials ($63,705) as of September 13, 2008. The account was credited with 19,195,318,157 Rials ($1,893,204) and debited by 18,570,434,463 Rials ($1,893,204) between January 17, 2008 and September 13, 2008. (All dollar amounts are calculated using the exchange rate provided on the financial certificates.) The petitioner included his Iranian construction license and a property deed. The petitioner also submitted an April 14, 1997 translation of a purported newspaper article announcing his position as a director of Pataveh Construction Company in Iran.

As evidence of the petitioner's investment, he submitted an August 24, 2008 wire transfer receipt documenting the transfer of $500,000 by order of the petitioner from an account at Emirates Bank to counsel and a September 3, 2008 wire transfer receipt reflecting the transfer of $500,000 to the Fund's escrow account from counsel's account. The "Other Beneficiary Information" section of the receipt states that the transaction is "for Benefit of [redacted]" An April 7, 2005 tax payment slip shows tax payments to Bank Melli but no evidence of the petitioner having an account at that bank.

On March 6, 2009, as acknowledged by [redacted] on certification, the AAO affirmed the TSC director's denial of another petition based on an investment in CARc. The AAO raised several concerns regarding provisions of the Operating Agreement.[2] On April 19, 2009, the petitioner

[2] The AAO found that, at the time of filing, the investment area had not been designated as a targeted employment area and that the provisions for capital in exchange for services, reserve accounts, management fees, interim and series investments, redemption of funds not invested and the ability to enter into side agreements were disqualifying.

supplemented the record with an amended Operating Agreement amended and supplemented as of January 22, 2009, after the date of filing, and an amended Private Placement Memorandum dated February 5, 2009, also after the date of filing, asserting that these documents were approved as an amendment to the regional center proposal on March 27, 2009. The petitioner also submitted the March 27, 2009 letter issued by Service Center Operations (SCOPS) approving an amendment to the regional center proposal. The petitioner also submitted two Equity Investment Commitment letters for development of the former Watergate hotel dated January 9, 2008 and June 1, 2008. The June 1, 2008 letter is from Global Capital Markets Advisors, LLC (GCMA), the Manager of the Fund, and is addressed to [redacted] of MR Watergate Capital, LLC in care of Monument Realty. [redacted] signed the letter accepting it. Finally, the petitioner submitted a business plan dated June 15, 2007 prepared by Monument Realty proposing that Monument Realty and Lehman Brothers Holdings redevelop the former Watergate Hotel.

The June 1, 2008 Equity Investment Commitment provides, at section 2(D), that the Fund's investment could be in the form of a letter of credit issued by a commercial bank. The letter of credit would only be released to the Project's senior lender upon the substantial completion of the Project's construction. In addition, section 2(A) provides that the first condition for closing is that the "Developer shall be the Owner of the Project." Thus, this commitment from the Fund contemplates that the aliens' investments would be invested in the joint venture only once the developer owns the project, specifically, the former Watergate Hotel. We acknowledge that the June 15, 2007 business plan prepared by Monument Realty lists the acquisition costs for the purchase of the building. That said, it was clearly contemplated that the Developer would acquire the property prior to any investment by the Fund. The Condominium Schedule on the second to last page of the business plan lists an acquisition date of November 1, 2007, prior to the June 1, 2008 Equity Investment Commitment and the date of filing in this matter. Under Section IV, Development Timeline, the plan indicates that Monument closed the hotel on July 31, 2007, reflecting that Monument Realty, which is affiliated with the developer according to page 13 of the Private Placement Memorandum, already owned the hotel property as early as July 31, 2007.

While the record does not contain the Operating Agreement and Private Placement Memorandum that were in force as of the date of filing, a June 13, 2009 letter from [redacted], submitted subsequently by the petitioner in this matter, discusses the amendments that occurred between the date of filing and the dates of the agreements submitted in April 2009. Specifically, section 2.4 of the Operating Agreement was added to limit interim investments to safe, short-term investments. In addition, other amendments were added to eliminate the ability of investors seeking benefits pursuant to section 203(b)(5) of the Act to reinvest proceeds or contribute services in lieu of a cash investment.

Provisions that are worth noting in the January 22, 2009 Operating Agreement submitted in April 2009 include section 3.4(b) of the Operating Agreement, which provides that in determining members' equity, the manager "shall have the right to apportion the Organization Costs among the Class A Units." Thus, the members' accounts will be reduced in value for the organizational costs incurred by the Fund. In addition, section 6.4(a) provides that a $35,000 expense fee is due from

members. While this fee may be waived, the same paragraph provides that in addition to these fees, "the Fund shall reimburse the Manager and its Affiliates for all direct, out-of-pocket costs incurred by the Manager, its Affiliates, members, employees or agents in connection with the sale of Units and the receipt of Capital Contributions." Subparagraph (b) further discusses a quarterly portfolio management fee and reimbursement costs to be paid to management. Subparagraph (c) discusses the payment of transaction fees to the managers. Finally, section 3.7 of the initially submitted Operating Agreement allows the manager and members to enter separate agreements setting forth additional rights and obligations governing the members' acquisition and ownership of Unites or other interest in the Fund. That said, we acknowledge that section 12.2 provides that the Operating Agreement "constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and fully supersedes any and all prior or contemporaneous agreements or understandings by the parties to the subject matter hereof."

On June 12, 2009, the director issued a Request for Evidence. In this request, the director raised concerns regarding the issuance of membership units in exchange for services or loans, the ability of the manager and members to enter separate agreements and the investment of funds into interim investments that might result in the loss of investment funds. The director also noted the use of construction loans for the development and that the aliens' investment would only be used as a letter of credit. In light of this limited commitment, the director questioned how these funds would be "at risk." In addition, as Lehman Brothers was mentioned as a co-developer with Monument Realty on the first page of the business plan, the director inquired as to the viability of the Watergate redevelopment project in light of that company's bankruptcy. Finally, the director noted that, as an Iranian investing funds that ultimately derived from Iran, the petitioner's transfer of funds might be covered by regulations issued by the Department of Treasury Office of Foreign Assets Control (OFAC). Thus, the director requested evidence that OFAC had issued a license for the transaction pursuant to 31 C.F.R. § 560 or other guidance from OFAC.

In his response, [redacted] asserts that changes to the operating agreement and private placement memorandum were informally approved by [redacted] of the USCIS Foreign Trader, Investor and Regional Center Program (FTIRCP) in 2007. The record, however, contains no evidence to support CARc's belief that the amendments had been approved, formally or otherwise.

The regional center record of proceeding, reviewed by this office contains a copy of a May 21, 2007 letter from CARc managers to [redacted] advising of amendments to the operating agreement.[3] The letter references an upcoming May 23, 2007 meeting with [redacted]. The regional center record of proceeding, however, includes no record of this meeting, rendering it *ex parte*. A September 21, 2007 letter from CARc to [redacted] requests a certificate of good standing but makes no reference to amended agreements. A December 12, 2007 e-mail from CARc's special immigration counsel at the time followed up on a request for a notice of change of address and advised that CARc's escrow

[3] Those documents from the regional center record of proceeding referenced in this paragraph have been added to the record of proceeding in this matter.

agent had changed. While CARc's counsel references a May 2007 meeting with [redacted] CARc's counsel does not mention any amendments to the operating agreement or inquire as to whether those amendments are acceptable. A May 20, 2008 e-mail message from FTIRCP to CARc's counsel confirms CARc's use of a new escrow agent and the company's address change. This detailed e-mail message makes no mention of amendments to the operating agreement other than those changing the escrow agent. These documents do not support [redacted] claim that CARc repeatedly sought approval of the amended agreements and relied on some type of informal communication that the agreements were acceptable.

Section 557(d)(1) of the APA limits *ex parte* communications, in part, as follows:

> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;
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> (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

Significantly, *ex parte* communications are not part of the record of proceeding and cannot be considered in future proceedings including those relating to Forms I-526 filed based on the approved regional center. Finally, the opinion of a single USCIS official is not binding and no USCIS officer has the authority to pre-adjudicate an immigrant-investor petition. *Matter of Izummi,* 22 I&N Dec. at 196. CARc's informal and *ex parte* communications with a USCIS official, none of which mention a new Operating Agreement and Private Placement Memorandum that differ radically from those approved in 2005, may not serve as a basis for this office to waive the investment requirements set forth in the regulations and precedent decisions or the requirement that material changes are not permitted after the date of filing.[4] *See Golden Rainbow Freedom Fund v. Ashcroft,* 2001 WL 1491258 *1 (9th Cir.) (reliance on a non-precedential position of legacy Immigration and Naturalization Service (INS), now USCIS, is a gamble and does not create retroactivity concerns).

[redacted] then notes that on March 17, 2009, CARc submitted an amendment request to SCOPS. The documents submitted at that time included the February 5, 2009 Private Placement Memorandum and the January 2009 Operating Agreement. [redacted] asserts that SCOPS approved these documents on March 27, 2009. The letter from SCOPS approving the amended documents was submitted on certification. [redacted] continues that the issues raised in the

[4] Specifically, none of the communications from USCIS mention the new agreements.

director's request for evidence were resolved through the regional center amendments and should not be "re-hashed in the context of numerous I-526 adjudications with investors."

[redacted] refers to a class of cases that were denied by the Texas Service Center based on a previous decision by this office on a CARc investor that raised several concerns relating to the Fund's 2007 Operating Agreement.[5] He acknowledges that despite the AAO's insistence in that decision that any amendments must serve as the basis of a new petition, CARc sought and obtained decisions reopening those denials after the AAO issued its decision. The AAO's relationship with the service centers is comparable to the relationship between a court of appeals and a district court. Thus, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). The AAO is bound by the regulatory authority and precedent decisions discussed above which state in no uncertain terms that a petition must be approvable when filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi*, 22 I&N Dec. at 175-76; *Matter of Katigbak*, 14 I&N Dec. at 49.

[redacted] continues:

> The Fund has been seeking approval of numerous initial I-526 petitions for over a year and has been substantially delayed by the inability to obtain such approval. The Fund's managers had thought that all of the documents submitted for regional center approval had reflected that USCIS had accepted them for all purposes. The Fund has amended documents to address USCIS' unexpected questions about these documents.

We reiterate that any delays were caused by CARc's decision to substantially change the agreements approved in 2005 and to rely on purported informal communications as to the acceptability of those documents. We also reiterate that the petitioner has been unable to produce any correspondence from any USCIS office, formal, informal or otherwise, even referencing those documents.[6]

Regarding the director's concern that the funds could be invested in risky interim investments, [redacted] responds that the amended Operating Agreement and Private Placement Memorandum were approved by SCOPS in March 2009. [redacted] notes that amended section 2.4 of the Operating Agreement and section VI of the Private Placement Memorandum limit interim investments to interest bearing accounts, government securities or other short term investments.

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[5] The AAO found that, at the time of filing, the investment area had not been designated as a targeted employment area and that the provisions for capital in exchange for services, reserve accounts, management fees, interim and series investments, redemption of funds not invested and the ability to enter into side agreements were disqualifying.

[6] As stated above, the May 20, 2008 e-mail message from [redacted] mentions only the change in escrow agent and the change of address. We are unable to infer from this message that [redacted] is also approving the amendments to the Operating Agreement and Private Placement Memorandum, documents that are not mentioned in this message.

Regarding the ability to obtain Class A units through services, [redacted] notes that this provision is not present in the amended Operating Agreement. Regarding the inclusion of provisions that allow the manager to enter into separate agreements with the members, [redacted] asserts that the Fund needs the flexibility to change investment vehicles should something render the current investment plan unfeasible.[7] [redacted] asserts that the regional center is aware of its responsibility to advise USCIS of any decision to withhold or withdraw funds from a commercial enterprise.

Regarding the director's concern that a letter of credit does not sufficiently place the investors' funds at risk for job creation, [redacted] asserts that the Fund is not requiring the typical collateral from the contractors. Rather, in accordance with normal business practices, the Fund is merely restricting the final draw on invested capital to once the construction is complete. [redacted] concludes that once the construction is complete, the investors' funds will be at risk should the condominiums not sell or the restaurant space not attract lessees. [redacted] does not explain how this risk relates to job creation resulting from the already completed construction.

Finally, [redacted] notes that Lehman Brothers is not listed as a key member of the Development Team for the Watergate project.

The petitioner submitted a July 2, 2009 letter from [redacted] acknowledging that PB Capital had defaulted on its loan for the Watergate but advising that an agreement had been reached between Monument Realty and Lehman Brothers affiliates, pursuant to which PB Capital will move to vacate the notice of default. Thus, as of June 23, 2009, there was still no need to reacquire the property for development. Finally, the petitioner submitted a July 24, 2009 Equity Investment Commitment letter designed to "supersede in all respects the prior commitment letter, dated June 1, 2008." Section 2(b) of this new letter requires that the invested funds be transferred in cash to the Project's capital account. Thus, the Fund no longer plans to simply issue a letter of credit. As will be discussed below, however, this letter also provides for large fees to be paid to the Fund's manager from this account. As with the June 1, 2008 letter, this new letter identifies the project budget as that identified in the original business plan. The total budget in the business plan is $205,352,942, which includes $86,311,411 in prior acquisition costs and $119,041,531 in future development costs. As discussed previously, at the time this business plan was prepared, Monument Realty had already acquired the project property. Thus, only the $119,041,531 in development costs remained to be funded.

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[7] The AAO's concern about these potential side agreements, as expressed in our previous decision referenced by [redacted], is that they have the potential for disqualifying arrangements not revealed to USCIS, such as a guaranteed return of funds. While the amended agreements have now been approved by SCOPS, we emphasize that it will be the petitioner's burden at the Form I-829 removal of conditions stage mandated pursuant to section 216(A) of the Act to demonstrate that the petitioner's funds remained at risk for job creation during the two year conditional period.

The petitioner also submitted an August 2009 business plan, superseding the June 15, 2007 plan. On page 9, the new plan states:

> While the physical redevelopment plan and its total cost of $205 million remains unchanged from the original business plan, the project has a revised total development cost of approximately $133.9 million, with $104.3 million of that cost allocated to the hotel and $29.6 million allocated to the condo. This variance arises from a reduction of approximately $40 million in Watergate's cash acquisition cost, due to elimination of Lehman's mezzanine debt as a result of PB Capital's foreclosure of the MR Watergate LLC partnership loan; and approximately $31 million from a combination of lower than originally projected financing costs and a shifting of the costs to the residential owners and commercial tenants for finish and improvements of the individual condominiums and independently operated restaurant, spa and retail shops ($205 million minus $40 million minus $31 million equals $134 million).

The plan then states that the Fund would provide $25,000,000 in equity. Additional funding would include $28,545,195 in sponsor equity and $80,317,794 in debt. In addition, the plan indicates that PB Capital is now willing to provide a construction loan of 60 percent of the total project cost.

The petitioner also submitted an August 18, 2009 letter from PB Capital Corporation explaining that the company has taken title to the Watergate property and has received letters of intent from several parties interested in acquiring the hotel. The letter, addressed to CARc, invites a best and final offer. In addition, the petitioner submitted an unsigned Confidentiality Agreement addressed to PB Capital Corporation.

Finally, counsel asserted that the petitioner sold property in France for 410 Euros ($541,200) in 2007, which was transferred to his account in Iran. Counsel further asserted that the petitioner transferred these funds through an account in the United Arab Emirates (UAE) to counsel's client trust fund. Regarding the need for a license from OFAC, counsel asserts that CARc management "performed an extensive 'suitability evaluation' prior to accepting [the petitioner] or any investor into its program." Counsel referenced the submission of CARc notations that the petitioner "cleared OFAC screens" and that OFAC had advised that "transactions completed wholly within the US, such as investment in CARc through US attorney, are not subject to OFAC Sanctions and regs." Counsel concluded that because Iran is included as a potential treaty trader country pursuant to section 101(15)(E) of the Act, investments from Iranian individuals must be acceptable.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). In support of counsel's assertions, the petitioner submitted a Promise of Sale whereby the petitioner and two other individual agreed to sell property in France and an attestation of the sale from a notary listing the final sales payment as 403,061.34 Euros. The petitioner also submitted three notices confirming the transfer of funds from

the Export Development Bank of Iran to Emirates Bank International listing the remittance information as "for buying house." The transfers total 1,855,000 Dirhams, or approximately $504,761 as stated by counsel. The petitioner resubmitted the transfer notice for the funds transfer from Emirates Bank International to counsel. Finally, the petitioner submitted a July 29, 2009 letter from OFAC acknowledging a license request.

On November 23, 2009, the director received a supplemental response. In this submission, the petitioner included a November 10, 2009 letter from [redacted] to GCMA advising that Monument Realty has "secured control of the subject property and are ready to proceed with the development and business plan outlined therein on or before December 16, 2009." Finally, the petitioner submitted a November 10, 2009 offer to purchase the Watergate Hotel from GCMA. The price is listed as $41,500,000, requiring a $4,150,000 deposit. The submission did not include any new information from PB Capital. The petitioner did include a license issued to CARc on October 9, 2009 based on correspondence from CARc dated July 27, August 27 and October 1, 2009. The license authorizes CARc, "subject to the conditions and limitations stated herein," to engage in all transactions necessary to export financial services in connection with applications for EB-5 category visas for several petitioners including the petitioner in the matter before us. Section 3(e) of the license states: "This License does not authorize any transactions that occurred prior to the date of its issuance."

On November 25, 2009, the director denied the petition. The director accepts that the petitioner had resolved all issues regarding the Operating Agreement and Private Placement Memorandum but states that future changes may result in additional inquiries. The director then concludes that the development project is not viable because PB Capital foreclosed on the property and that the reacquisition costs exceed those previously estimated. Finally, the director concluded that the petitioner had not established the lawful source of his funds.

On certification, [redacted] asserts that the August 2009 documents are the basis of a regional center amendment before the CSC director that, if approved, would resolve the director's concerns. As mentioned above, counsel subsequently submits evidence that this new amendment request has, in fact, been approved in a letter that explicitly advises investors to refile their petitions.

The petitioner also submits a December 8, 2009 updated financing plan, a November 30, 2009 letter of interest from Manolis & Company, LLC to provide $25 million. An undated loan document from U.S. Bank, N.A. listing the borrower as "To Be Determined" for the lesser of 50 percent of the total acquisition and development costs, 45 percent of the "as stabilized" value or minimum debt service coverage. This financing postdates the filing of the petition. Finally, the petitioner submitted a letter from [redacted] advising that based on the renovation budget of $80 million for a property included on the National Register, the project would be eligible for a $16 million tax credit.

Finally, the petitioner submits a license issued to CARc on October 9, 2009 based on correspondence from CARc dated July 27, August 27 and October 1, 2009. The license authorizes CARc, "subject to the conditions and limitations stated herein," to engage in all transactions

necessary to export financial services in connection with applications for EB-5 category visas for several petitioners including the petitioner in the matter before us. Section 3(e) of the license states: "This License does not authorize any transactions that occurred prior to the date of its issuance."

We will evaluate the above evidence under the appropriate regulations below. In doing so, we will not consider material changes that postdate the filing of the petition. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49. "Material" is defined as "having some logical connection with the consequential facts" and of "such a nature that knowledge of the item would affect a person's decision-making process; significant; essential." Black's Law Dictionary 998 (8th ed. 2004).

INVESTMENT OF CAPITAL

The regulation at 8 C.F.R. § 204.6(e) states, in pertinent part, that:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness.
>
> * * *
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
>
> > (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

> (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
>
> (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
>
> (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
>
> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

As quoted above, the definition of capital does not include compensation for services. The amendment precluding an alien investor seeking benefits pursuant to section 203(b)(5) of the Act from receiving membership units in exchange for services postdates the filing of the petition. That said, the petitioner in this case, prior to the date of filing, executed a subscription agreement committing $500,000 cash to the Fund. As this amendment is not consequential to this alien's investment, the amendment relating to this issue is not a material change in this case.

The full amount of the requisite investment, however, must be made available to the business most closely responsible for creating the employment upon which the petition is based. *Matter of Izummi*, 22 I&N Dec. at 179. The initial operating agreement dated November 1, 2007 allows for the creation of reserve accounts and lists many management fees. The amendment stating that the accounts and fees could not be funded from the aliens' initial $500,000 investment postdates the filing of the petition and is material to this alien's investment. As the use of the $500,000 investment is a consequential fact and knowledge of this fact affects our decision making process, this amendment constitutes a material change to the original agreement. As such, this amendment cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

Similarly, section 2.4 of the Operating Agreement and section VI of the Private Placement Memorandum limiting interim investments to interest bearing accounts, government securities or other short term investments postdates the filing of the petition. These amendments impact whether

the invested funds would be placed in secure interim investments that do not risk the loss of the money that is to be placed at risk for job creation. Thus, they are material. As such, we will not consider these amendments. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

In light of the above, we withdraw the director's conclusion that the previous concerns regarding the operating agreement have been resolved for the instant petition. The agreements originally submitted did not guarantee that the invested funds would be placed at risk for job creation.

While the new Operating Agreement may resolve this issue within the Fund for future petitions, more discussion of the necessity of making all of the invested funds available for job creation is warranted. The June 1, 2008 Equity Investment Commitment letter provides at section 5(B):

> 1. Upon execution and delivery of all the mutually acceptable Investment Documentation under the terms of this Commitment Letter ***and*** delivery of the Cash Equity and/or the LOC as provided herein, GCMA, as Manager of the Fund, shall receive a one time commitment fee of one percent (1.0%) of the Fund Equity and/or the LOC actually received;
>
> 2. Upon issuance and delivery of the Cash Equity and/or the LOC by the Fund, GCMA shall receive a one time original fee of one and one-half percent (1.5%) of the Cash Equity and/or the LOC actually received, plus reimbursement of its legal, documentation and recording costs in connection with the commitment of Fund Equity in an amount not to exceed $100,000; and
>
> 3. In connection with any distribution to the Fund upon the sale of the Project, GCMA shall receive a disposition fee equal to one percent (1%) of the greater of the amount of the Fund's allocable interest in the proceeds realized from such sale, or the Fund's Equity. Such disposition fee shall reduce the amount that, but for the payment of the disposition fee to GCMA, would otherwise be distributed to the Fund.

It is not clear where the funds to pay these fees would derive. As the Fund would only be providing a letter of credit, it is possible that these fees would not derive from the Fund's investment.

The July 24, 2009 letter, however, is more explicit and provides for greater fees to be paid to GCMA. Specifically, the same section of that letter provides:

> Subject to the conditions listed below, the Developer agrees to pay the following fees:
>
> 1. Upon execution of this Commitment Letter, GCMA as the Fund Manager shall receive an underwriting fee of Twenty-five Thousand Dollars ($25,000),

less any sum previously paid, altogether representing a contribution by the New Developer to his Capital Account.

2. Upon delivery of a mutually acceptable Investment Documentation under the terms of this Commitment Letter, the Manager shall receive a Fifty Hundred [*sic*] Thousand Dollar ($50,000) deposit to be applied toward its cost to review the Investment Documentation.

3. Upon execution and delivery of all of the mutually acceptable Investment Documentation under the terms of this Commitment Letter *and* delivery of the Fund Equity as provided herein, the Manager shall receive a one time origination fee of one and one-half percent (1.50%) of the Fund Equity received, **payable from the Project's Capital Account.**

4. Upon delivery of the Fund Equity, the Fund shall receive a one time commitment fee of two percent (2.0%) of the Fund Equity of the Fund Equity received, **payable from the Project's Capital Account**; and

5. Upon delivery of the Fund Equity, the Manager shall receive an annual Project and Asset management Fee ("PAM") equal to One-half of One Percent (0.5% p.a.) of the Approved Project Budget, payable quarterly, in advance, **from the Project Capital Account** during the construction phase and thereafter from the Operating Cash Flow of the Project.

6. In connection with any distribution to the Fund upon the sale of the Project, the Manager shall receive a disposition fee equal to one percent (1%) of the greater of the amount of the Fund's allocable interest in the proceeds realized from such sale, or the Fund Equity. Such disposition fee shall reduce the amount that, but for the payment of the disposition fee to the Manager, would otherwise be distributed to the Fund.

(Bold emphasis added.) While the developer is responsible for physically paying the above fees, the fees will derive from the Project Capital Account. According to the final paragraph of Section 2(B), closing will occur when, among other conditions, the Fund deposits the invested funds into the Project Capital Account. Thus, section 5(b) clearly calls for fees to be paid to the manager of the Fund from an account into which the invested funds have been placed.

We acknowledge that this letter likely was included in the 2009 documents that served as a basis for the most recent regional center amendment request. Without attempting to readjudicate the issue, we must raise the following concerns, accepting that the above letter does not preclude the approval of a petition supported by this letter. Specifically, it will be the petitioner's burden when filing a Form I-526 based on the July 24, 2009 letter to demonstrate that the Project Capital Account will include sufficient funds to pay these fees without the use of any of the $500,000 being invested by each

alien. While this may be a complicated burden, the regional center's decision to mix the investor funds into an account that will be paying large fees to the Fund's manager and the director's apparent acceptance of this plan does not relieve the alien investor from demonstrating that the full $500,000 will go towards job creation in conformance with *Matter of Izummi*, 22 I&N Dec. at 179. This decision is a designated precedent decision pursuant to 8 C.F.R. § 103.3(c) and, thus, is binding on all USCIS employees in the administration of the Act.

Finally, we concur with the director that the letter of credit to be released once construction is complete does not resolve how those funds would be available for job creation. The record documents the costs and job creation as a result of the renovations. It is not clear how funds released after the development would contribute to job creation. While [redacted] attempts to explain how these funds would be at risk once construction is complete, he does not explain how they will have been made available for job creation during the two-year conditional residency period. The July 24, 2009 letter which eliminates the use of a letter of credit postdates the filing of the petition. Similarly, the proposed use of these funds for the down payment on the reacquisition of the Watergate property, while now providing an explanation as to how the invested funds will contribute to job creation, is also a post-filing amendment. We conclude that both of these changes are material in that they are significant, essential and affect our decision making process. Thus, these post-filing amendments cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Izummi,* 22 I&N Dec. at 175-76; *Matter of Katigbak,* 14 I&N Dec. at 49.

In light of the above, the petitioner has not demonstrated that, as of the date of filing, his investment would be sufficiently at risk and available for job creation during the conditional residency period.

EMPLOYMENT CREATION

The regulation at 8 C.F.R. § 204.6(j)(4) states:

> (i) *General.* To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
>
> > **(A)** Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
> >
> > **(B)** A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

> (iii) *Immigrant Investor Pilot Program.* To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports[8] resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies including those set forth in paragraph (m)(3) of this section.

The regulation at 8 C.F.R. § 204.6(m)(3) provides:

> *Requirements for regional centers.* Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:
>
> (i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;
>
> (ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;[9]
>
> (iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;
>
> (iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and
>
> (v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported,[10] and/or multiplier tables.

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[8] After these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

[9] As stated in the previous footnote, after these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

The regulation at 8 C.F.R. § 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

Pursuant to 8 C.F.R. § 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit USCIS to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *Matter of Ho,* 22 I&N Dec. 206, 213 (Comm'r. 1998). Elaborating on the contents of an acceptable business plan, *Matter of Ho* states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

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[10] As stated in the previous footnotes, after these regulations were issued, the pilot program was amended to remove references to increased exports. Section 402 of the Visa Waiver Permanent Program Act, 2000, Pub. L. 106-396 (2000).

The original business plan, while setting forth acquisition costs, clearly indicates that Monument Realty had already incurred those costs as the plan indicates Monument Realty already owned the Watergate property. Thus, any future investment would focus on the development of that property. In addition, the original commitment letter would require only a letter of credit from the Fund, not to be released until completion of the construction, with little explanation as to how the funds supporting that letter of credit would be used for job creation during the two-year conditional residency period.

By July 2009, the Fund had abandoned the idea of merely offering a letter of credit and committed to providing cash to a capital account from which large fees would be paid to the Fund's manager. By August 2009, due to the foreclosure on the Watergate, the business plan was amended to include the reacquisition of this property. [redacted] asserts on certification that these amendments have all been included in a request for an approved amendment to the regional center proposal. As stated above, the director has now approved the amendment. Thus, at issue is whether these changes are material.

In *Matter of Izummi*, 22 I&N Dec. at 175, the AAO considered counsel's assertion that a non-precedent decision by the AAO had approved a "completely different business plan that abandoned the troubled-business claim and substituted a plan to create a new business instead." The AAO responded that the decision referenced by counsel was not a binding precedent pursuant to 8 C.F.R. § 103.3(c) and concluded "that acceptance of the new business plan at such a late date was improper and erroneous." *Id.* at 175. While the facts in *Matter of Izummi* involved amendments to agreements rather than a business plan, that decision opines that the reasoning requiring a petition to be approvable when filed[11] applies to material changes in business plans as well. *See also Spencer Enterprises v. U.S.*, 229 F.Supp.2d 1025, 1038 n. 4 (E.D. Cal. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (accepting an AAO determination that business plan amendments submitted for the first time on appeal could not be considered).

While we recognize that business plans often require some flexibility to deal with unforeseen circumstances, the business plan and the terms of the commitment letter in this matter have been amended with nearly every filing. These amendments go far beyond mere clarifications. USCIS should not and cannot be required to constantly respond to these continuous amendments in the context of a single petition. As late as July 2009, [redacted] and [redacted] were assuring USCIS that the default on the Watergate property was a strategic maneuver to eliminate Lehman's interest and that PB Capital would vacate the notice of default. The notice was not vacated, however, and PB Capital foreclosed on the property, resulting in the need to reacquire the property. During this proceeding, there was clearly a time when the reacquisition was in doubt and, thus, the entire project was questionable. The resolution of those problems must form the basis of a new petition. While the new plan now reduces development costs to account for the new acquisition costs, the amendment to shift costs of the commercial establishments to the tenants may impact the job

[11] *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49.

creation predictions included in the initial petition and, thus, would appear to be a material change. While the evidence submitted on certification reveals that the developer has secured sufficient financing, those commitments all postdate the filing of the petition. Securing the necessary financing is a material issue.

In light of the above, while [redacted] purports to address the director's final concerns expressed in the certified decision, the resolution of those concerns relates to a materially changed business plan and commitment letter from the plan initially submitted. Therefore, the new business plan must form the basis of a new petition.

SOURCE OF FUNDS

The regulation at 8 C.F.R. § 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:
>
> (i) Foreign business registration records;
>
> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
>
> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. *Matter of Ho*, 22 I&N Dec. at 210-211; *Matter of Izummi*, 22 I&N Dec. at 195. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. *Id.* Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). These "hypertechnical" requirements serve a valid government interest: confirming that the funds utilized are not of suspect

origin. *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1040 (E.D. Calif. 2001) *aff'd* 345 F.3d 683 (9th Cir. 2003) (affirming a finding that a petitioner had failed to establish the lawful source of her funds due to her failure to designate the nature of all of her employment or submit five years of tax returns).

First, the investment appears to have been made on behalf of a corporation. While the petitioner may be the sole shareholder of this corporation, a corporation is a separate legal entity. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r. 1980) and *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r. 1980). *See also Matter of Izummi,* 22 I&N Dec. at 195 (noting that evidence of the earnings of the petitioner's corporation says nothing about the petitioner's level of income). Thus, the transfer to escrow does not represent a personal investment by the petitioner.

Finally, it remains to discuss whether the petitioner's investment complies with relevant executive orders and regulations relating to transactions with Iran. Specifically, on October 29, 1987, President Ronald Reagan issued Executive Order 12613 imposing a new import embargo on Iranian-origin goods and services. *See* 52 Fed. Reg. 41940 (Oct. 30, 1987). On March 16, 1995, President William Clinton declared a national emergency with respect to Iran pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701, to address "the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States" constituted by the Government of Iran, including its support for international terrorism, efforts to undermine the Middle East peace process, and acquisition of weapons of mass destruction and the means to deliver them. E.O. 12957, 60 Fed. Reg. 14615 (March 17, 1995). The President subsequently issued Executive Order 12959 imposing more comprehensive sanctions to further respond to the Iranian threat. *See* 60 Fed. Reg. 24757 (May 9, 1995). Finally, on August 19, 1997, the President issued Executive Order 13059 to consolidate and clarify the previous orders. 62 Fed. Reg. 44531 (August 21, 1997), and prohibiting virtually all trade and investment activities with Iran by U.S. persons. Executive Order 13059 continues in effect. *See* 70 Fed. Reg. 12581 (March 10, 2005) ("Continuation of the National Emergency With Respect to Iran"). On March 17, 2000, the Secretary of State eased restrictions to permit the importation of carpets and certain food. On November 10, 2008, the authorization for "U-turn" transfers involving Iran was revoked. *See* 73 Fed. Reg. 66541 (Nov. 10, 2008).

The regulations implementing the above executive orders are set forth at 31 C.F.R. § 560. Specifically, the regulation at 31 C.F.R. § 560.204 provides:

> Except as otherwise authorized pursuant to this part, including §560.11, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, the exportation . . ., directly or indirectly, from the United States, or by a United States person, wherever located, of any . . . services to Iran or the Government of Iran is prohibited . . ..

The regulation at 31 C.F.R. § 560.516 provides:

> (a) United States depository institutions are authorized to process transfers of funds to or from Iran or for the direct or indirect benefit of persons in Iran or the Government of Iran, if the transfer is covered in full by any of the following conditions and does not involve debiting or crediting an Iranian account:
>
> (1) The transfer arises from an underlying transaction that has been authorized by a specific or general license issued pursuant to this part;
>
> (2) The transfer arises from an underlying transaction that is not prohibited by this part, such as a non-commercial remittance to or from Iran (e.g. a family remittance not related to a family-owned enterprise); or
>
> (3) The transfer arises from an underlying transaction that is exempted from regulation pursuant to § 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), such as an exportation to Iran or importation from Iran of information and informational materials, a travel-related remittance, or payment for the shipment of a donation of articles to relieve human suffering.

In addition, the regulation at 31 C.F.R. § 560.203 provides:

> (a) Any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions contained in this part is hereby prohibited.

These OFAC regulations are lengthy and complex and the AAO has limited experience in interpreting these regulations. Nevertheless, we cannot conclude that section 203(b)(5) of the Act permits transactions by Iranians that would otherwise be prohibited by the above executive orders and 31 C.F.R. § 560. Similarly, counsel is not persuasive that the eligibility for Iranians to qualify for a nonimmigrant investor visa pursuant to section 101(a)(15)(E)(ii) of the Act overrides transactional prohibitions that derive from the above executive orders and 31 C.F.R. § 560. Moreover, the regulation at 8 C.F.R. § 204.6(j)(3) mandates that a petitioner demonstrate the lawful source of his funds. That regulation, which has not been struck down by a federal court and, in fact, has been favorably referenced in *Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1040, is binding on USCIS. [12]

[12] In seeking licensure from OFAC, counsel for CARc assured OFAC in a July 27, 2009 letter that "[a]ll applicants are required to prove that the investment capital is derived from lawful activity."

We affirm the director's refusal to rely on the assurances of counsel and CARc representatives that they had obtained informal assurances from OFAC that the investment at issue was not prohibited. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. Similarly, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Significantly, CARc's July 27, 2009 letter to OFAC "requests that you determine either 1) no license is required for CARc, a U.S. [Citizenship] and Immigration Service[s] ('USCIS') designated regional center, to process funds from EB-5 Iranian visa applicants and to perform other antecedent and ancillary activities relevant to the EB-5 application process or 2) to grant a specific license to CARc to process funds from EB-5 Iranian visa applicants and perform other antecedent and ancillary activities related thereto for the attached list of Iranian applicants." The October 9, 2009 letter accompanying the OFAC license issued on that date states that one investor is not ordinarily a resident in Iran and, thus, no license is required for that investor. The license covers the remaining aliens identified by CARc, including the petitioner in the matter before us. It is clear from this response from OFAC, where it determined that a license is not required for one alien but issued a license for the remaining aliens (including the petitioner), that the transaction from the petitioner does, in fact, require a license.

The license authorizes CARc to engage in all transactions necessary to export financial services in connection with applications for EB-5 category visas for several aliens including the petitioner. Thus, the license appears to permit CARc to "export" services but does not appear to authorize otherwise prohibited transactions of funds ultimately deriving from specific Iranian banks. Specifically, section 3 of the license includes warnings that are problematic.

First, subparagraph (b) states: "Any transfer of funds through the U.S. financial system pursuant to the authorizations set forth in SECTION 1 hereof must be effected in a manner consistent with 31 C.F.R. § 560.320 and may not involve the debiting or crediting of an "Iranian account," as such term is defined in 31 C.F.R. § 560.320."

Second, subparagraph (e) states that the license does not authorize any transactions that occurred prior to the date of issuance. As such, the October 9, 2009 license cannot cover the transfer of funds from Iran, through UAE to the escrow account in 2008.

Third, subparagraph (d) states:

> U.S. persons are generally prohibited from engaging in any transactions directly **or indirectly** involving Bank Daderat, Bank Sepah, Bank Mellat, Bank Melli, Future Bank B.S.C., or the **Export Development Bank of Iran**, including transactions that might otherwise be permitted under the ITR [Iranian Transactions Regulations].

> **Prohibited transactions include transactions ordinarily incident to the transactions authorized herein.**

(Bold emphasis added.)

As stated above, the record traces the funds from the Export Development Bank of Iran through the UAE to counsel. Thus, it would appear that the transaction, which indirectly involves the Export Development Bank of Iran, is not covered by the license.

Finally, section 2(e) provides that the authorizations in the license shall expire if the petition is granted, denied, withdrawn or otherwise no longer pending with the appropriate U.S. Government agency or agencies. Thus, any new petition would need to be supported by a new license issued prior to any transfer into escrow.

The AAO contacted OFAC for additional clarification of the terms of the license, but OFAC has provided no further comment. We once again acknowledge that the AAO has limited experience in interpreting the OFAC regulations at 31 C.F.R. § 560 et seq. Accordingly, the AAO must rely on a reasonable reading of the plain language of both the regulations at 31 C.F.R. § 560 et seq. and the license. The most reasonable interpretation from the plain language is that the license is limited to the export services of CARc, does not cover the receipt of money from prohibited banks and, regardless, does not apply to any transactions predating the issuance of the license.

In light of the above, the license provided does not cover this earlier transaction, expires upon our affirmation of the director's denial and contains warnings that suggest a similar license CARc may obtain in the future may not cover the funds as they indirectly derive from a prohibited bank. Accordingly, the petitioner has failed to establish that his investment was obtained through lawful means.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The decision of the director is affirmed. The petition is denied.